IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.591 OF 2005

Sayyad Shaukat Sayyad Abdul Mistri ...Petitioner

Vs.

Smt. Tanveer Banu Sayyad Shaukat
& Anr. ...Respondents

Mr. Shilpa G. Joshi for the Petitioner.
Shri. P.N. Joshi for the Respondent No.1.
Shri. A.S. Gadkari, A.P.P. for the Respondent No.2.

CORAM : A.S.OKA, J.
DATED : JULY 19, 2005.

P.C.:

1. In the last week the Counsel appearing for the parties were fully heard and this Petition was kept today for dictation of judgment. This Petition under Article 227 of the Constitution of India arises out of a dispute between the Petitioner-husband and the Respondent No.1-wife relating to the custody of their minor children. The son Ashia is born on 6th October, 2001 and daughter Hamza is born on 27th August, 2002. An Application was made by the Respondent No.1 before the learned Judicial Magistrate, First Class under section 97 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code of 1973). In the said Application, the allegation made by the Respondent No.1 against the Petitioner is that the Respondent No.1 was driven out by the Petitioner about six months prior to date of filing the Application and therefore, she had to take shelter alongwith two minor children in the house of her parents. After period of about one month, on the request made by the Petitioner, parents of the Respondent No.1 told the

Respondent No.1 to go back with the Petitioner. The case of the Respondent No.1 is that after she resumed cohabitation, the Petitioner started giving threats to her and the Petitioner assaulted her. Therefore, again the Respondent No.1 was compelled to go back to her parents alongwith the children.

2. The allegation of the Respondent No.1 is that on 13th November, 2004, the Petitioner alongwith two unknown persons came in a car to the house of the parents of the Respondent No.1. The Petitioner threatened the Respondent No.1 and took away the two minor children with him. Therefore, the Respondent No.1 approached the Court of the learned Magistrate by filing Application under section 97 of the Code of Criminal Procedure. On 17th November, 2004, the learned Magistrate issued search warrant against the Petitioner and others. By order dated 1st December, 2004, learned Magistrate directed that the custody of both children should be given to the Respondent No.1. It is not in dispute that the said order was implemented forthwith.

3. A Revision Application was preferred by the present Petitioner to the Sessions Court which came to be dismissed by judgment and order dated 17th January, 2005.

4. The learned Counsel appearing for the

Petitioner submitted that the Application invoking Section 97 of the said Code of 1973 was not maintainable and while dealing with the said Application learned Magistrate could not have passed the order of disturbing the custody. The learned Counsel further submitted that custody could have been disturbed only in accordance with the provisions of law.

5. The learned Counsel for the Respondent No.1 supported impugned judgment and order. He submitted that the custody of the minor children was taken by the Petitioner by use of force and that is how the minors were in the custody of the Petitioner. He submitted that the learned Magistrate has recorded satisfaction regarding wrongful confinement of the children while earlier order was passed on 17th November, 2005. He submitted that no interference is called for in this Petition.

6. I have considered the rival submissions.

Section 97 of the said Code of 1973 reads thus:

> If any District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search

> shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

The section further provides that after search is ordered to be made, if the person allegedly confined is found, such person shall be immediately taken before the Magistrate who shall make such order as in circumstances of the case seem proper.

7. On plain reading of order dated 17th November, 2004 by which search warrant was issued, it is obvious that the learned Magistrate has not recorded any such satisfaction. Even if final order passed on 1st December, 2004 is perused, no specific finding regarding illegal confinement has been recorded by the learned Magistrate warranting action under section 97 of the said Code of 1973. All that the learned Magistrate has observed while passing the order dated 1st December, 2004 is that since the age of the children is below five years the mother is proper custodian and therefore, it was proper to handover the custody of the children in question to the Respondent No.1. While dismissing the Revision preferred by the Petitioner, the learned Additional Sessions Judge has observed that evidence of the husband appears to be of much more lower quality inspiring no confidence and the evidence adduced by the Respondent No.1 appears to be consistent and therefore, the learned Magistrate rightly issued the search warrant. It is obvious that

learned Additional Sessions Judge did not notice that in order dated 17th November, 2004 or in order dated 1st December, 2004, the learned Magistrate has not recorded the satisfaction that he had reason to believe that the minor children were confined under such circumstances that confinement amounts to an offence. In my view, the tenor of the order of the learned Magistrate shows that he has decided the proceedings as if he was dealing with the Application under the Guardians and Wards Act. In my view, the orders passed by the learned Magistrate cannot be sustained at all.

8. The learned Counsel appearing for the Petitioner submitted at this stage that as the order of the learned Magistrate is found to be illegal, custody of the minor children has to be restored forthwith in favour of the Petitioner. I am not inclined to accede to the said request. It cannot be forgotten that the age of the son is just below four years and the daughter is about three years old. By virtue of the order of the Judicial Magistrate, from 1st December, 2004, the said minor children, are in the custody of the mother almost for last more than seven months. When it comes to the question of disturbing the custody of the minor children only paramount consideration should be the welfare of the minor children. The question whether the custody can be disturbed or not can be considered only by a proper

court having jurisdiction to entertain proceedings under the Guardians and Wards Act. Though the order of the learned Magistrate is found to be illegal, I am not inclined to disturb the custody immediately considering the fact that minor children of such tender age are in custody of the Respondent No.1 for last more than seven months. It will be unjust to disturb the minors of tender age in this fashion on two occassions within a short span of eight months. The question of proper custody can be decided only by appropriate court. It is for both the parties to approach the competent court under the Guardians and Wards Act for establishing their right to custody of the minor children and it is for them to take out the appropriate proceedings for seeking such interim orders as may be permissible in law. Therefore, I propose to direct that the custody of the minor children by the Respondent No.1 shall not be disturbed for the period of eight weeks from today. The custody of the minors by the Respondent No.1 will be subject to such interim/final order as may be passed by the appropriate Court. For a period of eight weeks from today, Petitioner will be at liberty to meet minor children on every Sunday between 3.00 p.m. to 7.00 p.m. at the place of residence of the Respondent No.1. The Respondent No.1, considering the tender age of the children, must ensure that the Petitioner is allowed to meet the children.

9. Hence, I pass the following order:

: O R D E R :

i) The impugned orders dated 17th November, 2004, 1st December, 2004 and 17th January, 2005 are quashed and set aside and the Application made by the Respondent No.1 being Miscelleneous Application No.98 of 2004 stands dismissed.

ii) For a period of eight weeks from today, the custody of both the minor children will continue to remain with the Respondent No.1. Both the parties are at liberty to immediately apply before Competent Court under the Guardians and Wards Act or under any other law for obtaining suitable orders regarding custody of the minor children.

iii) The custody of the Respondent No.1 of the minor children will be subject to interim/final orders which may be passed by the concerned Court on Application made by either the Petitioner or the Respondent No.1.

iv) Any such applications which are made by the parties will be decided by the concerned Court on its own merits without being influenced by the order passed by this Court or the orders passed by learned Magistrate and learned Additional Sessions Judge.

v) For period of eight weeks from today, it will be open for the Petitioner to visit the residence of the Respondent No.1 on every Sunday between 3.00 p.m. to 7.00 p.m. for meeting minor children and the Respondent No.1 will permit the Petitioner to meet the minor children.

vi) On the failure of the parties to obtain any appropriate interim or final order as regards custody of the minor children from the Competant Court within period of eight weeks from today, the Respondent No.1 will have to handover the custody of the minor children to the Petitioner.

vii) Rule is made absolute in above terms.

viii) Parties to act upon an authenticated copy of this order.

JUDGE